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Inside EPA

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Exclusion Of 'Legacy' Uses From TSCA May Limit Cleanups, Critics Tell EPA

By Dave Reynolds and Maria Hegstad, 7/19/17

EPA is drawing criticism from its children's health advisors and a Region 9 official over its decision to preclude legacy uses of chemicals, such as asbestos, in finished products from review under the new Toxic Substances Control Act (TSCA), bolstering criticisms from environmentalists who say they may sue the agency over its approach.

During a July 18 meeting of EPA's Children's Health Protection Advisory Committee (CHPAC), several panelists objected to EPA's exclusion of legacy uses from the scope of the risk evaluation rule, charging it could undermine remediation efforts and other regulatory requirements.

And an official with EPA's Region 9 who dialed in to the meeting backed the concern, suggesting EPA's determination creates inconsistencies in remediation and other requirements to address TSCA-regulated substances.

But EPA toxics officials who spoke at the meeting downplayed the concerns, saying the law did not provide EPA with authority to address legacy uses even as the officials left the door open to future case-by-case reviews of legacy uses.

EPA's stance is codified in its June 22 final risk evaluation rule that narrowed the definition of covered chemical uses from an Obama EPA proposal that included oversight of legacy uses.

The change is one of several aspects of three final TSCA implementation rules that environmentalists and some Senate Democrats have argued bend to industry demands and will weaken the effectiveness of the bipartisan reform law that former President Barack Obama signed in June 2016.

Many EPA critics are especially concerned over use of this approach in the agency's pending assessment of asbestos, one of the first 10 existing chemicals the Obama EPA selected for evaluation shortly before leaving office, a substance that has widespread legacy uses.

EPA's scoping document for its upcoming assessment of asbestos states that the agency "interprets the mandates under section 6(a)-(b) to conduct risk assessments and any corresponding risk management to focus on current and prospective uses, for which manufacture, processing, or distribution in commerce is intended, known or reasonably foreseen, rather than reaching back to evaluate the risks associated with legacy uses, associated disposal, and legacy disposal."

But advocacy groups, such as the Asbestos Disease Awareness Organization (ADAO), are criticizing the scoping document as "lackluster" and promising to push to expand it.

The group's founder, Linda Reinstein, said in a July 13 interview with *Inside EPA* that she welcomed EPA's inclusion in the literature search a 2013 National Institute for Occupational Safety and Health (NIOSH) epidemiology study of firefighters, which ADAO urged EPA to review.

The study indicates that firefighters' rate of developing mesothelioma, the deadly lung cancer linked to asbestos exposure, is twice that of the general population, according to an October 2013 NIOSH press release describing the study, which included nearly 30,000 firefighters in three cities, Chicago, Philadelphia and San Francisco.

But she said such evidence supports her point that legacy uses must be considered in EPA's

pending risk evaluation. "It's very hard to give up legacy uses when firefighters are dying at twice the rate of the general population," she said, adding that in new comments to EPA on the scoping documents, "We'll argue part of [ongoing] commerce takes in legacy" uses of asbestos. She noted that there are active industries performing asbestos abatement and disposal.

And she added that she and her colleagues are preparing to submit more evidence to EPA showing that there is not a safe level of exposure to asbestos.

Case-By-Case Review

EPA faced similar criticisms at the CHPAC meeting. Joel Forman, an associate professor of pediatrics at the Icahn School of Medicine at Mount Sinai in New York and a CHPAC member, faulted the administration's reserving the right to exclude legacy uses from TSCA oversight, noting that risks from common contaminants, such as asbestos, could still be mitigated even if they are no longer produced in the United States.

And the EPA Region 9 official also pressed agency headquarters staff on the exclusion of so-called legacy uses, suggesting the policy led to inconsistent treatment of contaminants. The official said Region 9 requires schools to mitigate risks of building materials containing polychlorinated biphenyls (PCBs), a TSCA-regulated substance, but that other building materials, such as asbestos, may be present in schools and not considered an ongoing use.

"On the use and disposal point in TSCA reform" and not considering legacy issues, the official said, "I wonder how that's being parsed out."

But Tala Henry, director of the Risk Assessment Division in EPA's Office of Pollution Prevention and Toxics (OPPT), shrugged off any direct comparison to PCBs, saying the contaminant is a special case under the law. But Henry said the decision to exclude legacy uses generally from the scope of the TSCA prioritization and risk evaluation rules was the subject of significant debate inside the agency, including with EPA's general counsel, prior to issuance of the final rules.

"TSCA is all about the manufacturing, importing, distribution and use of chemicals," she said. "If none of those things are occurring there's not actually a way for TSCA to deal with the potential risks, so it was decided that legacy uses," or chemicals no longer made for a certain use, would be outside the scope of the rules.

While much of the criticism is aimed at EPA's decision to sidestep review of legacy uses of asbestos, another EPA official told the meeting that the agency still has the ability to review legacy uses on a case-by-case basis.

OPPT Director Jeff Morris suggested during the meeting that covering legacy uses would put EPA in the business of removing old sofas or attic insulation, which often contain chemicals that are no longer manufactured.

Noting that concern, Morris said that EPA's final risk evaluation rule takes a more nuanced approach. He said that in certain situations TSCA tools may allow EPA to address legacy uses, though with other uses the law may not apply, so the administration is reserving the right to exclude certain uses on a case-by-case basis.

Morris argued that conducting an in-depth analysis of certain uses and merely a screening level assessment of others will allow EPA to focus limited resources on uses of greatest concern. He also said that scoping documents for future reviews will address the depth of review that uses will receive and so stakeholders' input could help guide EPA's focus on uses of a particular chemical.

Such arguments push back against criticism environmentalists raised last month after EPA released the three "framework" rules to implement statutory changes to address "existing" chemicals under the revised TSCA. The risk evaluation and prioritization rules are slated for publication in the *Federal Register* July 20, beginning the time frame in which advocates could file a lawsuit challenging the rules.

In response to EPA's announcement of the rules last month, the Environmental Defense Fund's (EDF) Richard Denison argued that the Trump administration had made significant changes from draft rules issued in the waning days of the Obama administration and suggested the risk evaluation rule could be vulnerable to legal challenge.

Denison faulted the agency for narrowing the range of chemical "uses" it will consider in its assessments, arguing that "EPA's approach complicates and undermines the clear intent of Congress that EPA examine the full range of exposures to a chemical," according to an EDF statement.

Forman and Tom Neltner, an EDF attorney who is also a CHPAC member, reiterated their opposition.

Neltner argued that EPA's determination that an already-produced product is outside the scope of TSCA is inconsistent with the revised TSCA and undermines the bipartisan effort to reform the law.

"We'll have the states and counties all doing their own regulation because EPA has chosen not to do its job," Neltner told Henry. "Not you, but management."